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state financial aid to restricted clubs.[67] A definitive statement in this area is long overdue, and the delay is largely responsible for the divergent paths taken by the lower federal courts in *Pitts, McGlotten,* and *Green.* When it comes, it is to be hoped that the Court will adopt an approach that focuses on the real interests at stake, one more intellectually coherent than the almost metaphysical attempt to find "significant state involvement" in the mere grant of tax benefits.

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Constitutional Law—The Equal Protection Clause and the Student's Right to Vote Where He Attends School

The right of students to vote in the communities where they attend school has become an issue of vastly greater significance since the twenty-sixth amendment was ratified on June 30, 1971. Now that the age barrier has fallen,[1] the number of eligible student voters has increased, as have fears in some college communities that students may now be able to control local elections. Whether this spectre will materialize depends on many factors, but the principal obstacle remaining is

[67]The district court decision in *Green* was affirmed *per curiam.* Coit v. Green, 92 S. Ct. 564 (1971). In *Pitts* the defendant did not appeal, and there has been no reported Supreme Court disposition in *McGlotten.* Any future disposition of a recent Alabama federal district court decision, Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972), should be noted. The court there held that the city of Montgomery may not permit the use of its recreational facilities by private segregated academies, saying "what is important is the *effect* the state's aid has on the maintenance of a racially balanced public school system, but . . . the *extent* of the aid provided is immaterial." *Id.* at 24. Turning to the problem of use of the same facilities by private groups other than schools, the court felt

> the test should be somewhat different. Whereas state and city officials are under an affirmative obligation to end discrimination in situations involving education, this affirmative duty does not extend to cases involving private groups other than those affiliated with schools. Consequently, although state aid to such a group is unconstitutional if the organization discriminates on the basis of race, the mere fact that such an organization is segregated is not enough to render state aid to it *per se* constitutionally improper.

Id. at 25-26.

[1]A recent California case held unconstitutional the presumption that the residence of unmarried minors is at the home of their parents. The fact that students brought the suit was only incidental since the discrimination was "on account of age." Jolicoeur v. Mihaly, 5 Cal. 3d 565, 570-575, 96 Cal. Rptr. 697, 699-703, 488 P.2d 1, 4-7 (1971); *accord,* Ownby v. Dies, 337 F. Supp. 38 (E.D. Tex. 1971) [declaring TEX. ELECTION CODE art. 5.08(m) (Supp. 1972) unconstitutional].

created by state residence requirements, and assaults against that barricade are already underway. This note will examine state laws that govern student voting in college towns and will evaluate the recent decision by the Michigan Supreme Court in *Wilkins v. Bentley*,[2] which held unconstitutional a statute that hindered the establishment of voting residences by students in college towns.

I. THE LAW OF DOMICIL AND STUDENT VOTING RESIDENCE

The common pattern of residence requirements for voting includes a presumption that students do not reside where they attend school. The statute struck down by the Michigan Supreme Court in *Wilkins* was identical in form to statutes in eighteen other states[3] and was substantially similar to statutes in six states.[4] It stated: "No elector shall be deemed to have gained or lost a residence . . . while a student at any institution of learning."[5]

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[2]385 Mich. 670, 189 N.W.2d 423 (1971). The *Wilkins* court held that the statute violated the due process clause as well as the equal protection clause, but it did not rest its decision on due process grounds. *Id.* at 678-679, 189 N.W.2d at 427. The court's discussion of the due process clause and its relation to the statute was taken chiefly from a law journal note, *Restrictions of Student Voting: An Unconstitutional Anachronism?*, 4 J.L. REFORM 215, 221-22 (1970).

[3]ALA. CODE tit. 17, § 17 (1959); ALASKA STAT. § 15.05.020 (1971); ARIZ. CONST. art. 7, § 3; CAL. ELECTIONS § 14283 (West 1961); HAWAII REV. STAT. tit. 2, § 11-13(5) (Supp. 1971); IDAHO CONST. art. 6, § 5; KAN. CONST. art. 5, § 3; LA. CONST. art. 8, § 11; MINN. CONST. art. 7, § 3; MO. CONST. art. 8, § 6; MONT. CONST. art. IX, § 3; N.H. REV. STAT. ANN. § 54:10 (Supp. 1971); N.M. CONST. art. VII, § 4; N.Y. CONST. art. 2, § 4; PA. STAT. ANN. tit. 25, § 2813 (1963); S.C. CONST. art. 2, § 7; TEX. ELECTION CODE art. 5.08 (Supp. 1972). All these statutes explicitly enact presumptions. North Carolina has no such statute.

Ohio's statute, OHIO REV. CODE § 3503.05 (1960), was held to violate the equal protection clause in Anderson v. Brown, 332 F. Supp. 1195 (S.D. Ohio 1971) (per curiam).

The New York statute was upheld against constitutional challenge in Gorenberg v. Board of Election, 328 N.Y.S.2d 198 (App. Div. 1972), and in Whittington v. Board of Elections, 320 F. Supp. 889 (N.D.N.Y. 1970). The current status of New York law is surveyed in Note, *Student Voting and the Constitution: New York State Bona Fide Residency Requirement*, 72 COLUM. L. REV. 162 (1972).

The Texas statute was upheld in Wilson v. Symm, 341 F. Supp. 8 (S.D. Tex. 1972).

[4]The following statutes do not specifically enact a presumption but provide that a student may not gain a voting residence by attending a school. They are construed as not preventing the acquisition of a voting residence by a student who can prove residence by facts other than his enrollment in school. *See* Carrington v. Rash, 380 U.S. 89, 91 n.3 (1965). MO. CONST. art. II, § 1; NEV. REV. STAT. § 293.487 (1969); UTAH CODE ANN. § 20-2-14(2) (1953); VT. STAT. ANN. tit. 17, § 66 (Supp. 1971); WASH. REV. CODE § 29.01.140 (Supp. 1971); WYO. STAT. ANN. § 22-118.3(k)(2) (Supp. 1971).

[5]MICH. STAT. ANN. § 6.1011(b) (Supp. 1971), *quoted in* Wilkins v. Bentley, 385 Mich. 670, 675, 189 N.W.2d 423, 424-25 (1971). This statute has a protective aspect which presumes that a student does not lose his residence by attending school. No issue is raised here about this aspect

Virtually all states interpret voting statutes that limit the franchise to residents as requiring that one must be domiciled in the community in order to vote.[6] Domicil may be briefly defined as the place one normally abides. To establish a domicil one must go to a place with the intention of remaining there. Any absence must be considered temporary, and there must be an intention of returning to the former abode. The difference between simple residence and domicil lies in one's attitude and intentions.[7] A person might suppose himself able to determine his own domicil. That is not the case, however, for when domicil is called into question, a court is not bound to accept a party's declarations as to his intended domicil but may look at extrinsic facts to make its own determination.[8] This power of the court is clearly necessary in non-voting situations, as when jurisdictional questions or choice-of-law disputes arise. If the court did not have this power, an interested party could resolve the issue in his own favor. However, the result of applying the same test to qualifications to vote is that one is not able to choose his own voting residence.

In accordance with the interpretation of "residence" in voting statutes as "domicil," state courts have created common-law presumptions against domicil that in no way differ from the presumption in the Michigan statute. The courts rightly assume that the ordinary student establishes residence at a college or university for the temporary purpose of pursuing his education. In order to overcome the presumption, the student must prove his intent to establish a domicil—a burden that is often difficult to carry.[9]

Two views prevail among the states as to the ease with which a student may acquire a new domicil. By the more stringent view, the student must establish an intent to reside in the community *permanently* or for an *indefinite* time—a period that does not terminate with his graduation.[10] By the more liberal view, once a student has established

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of the statute because it preserves rather than inhibits the freedom to maintain a domicil of choice.

[6]*See* Vanderpoel v. O'Hanlon, 53 Iowa 246, 5 N.W. 119 (1880); Shaeffer v. Gilbert, 73 Md. 66, 20 A. 434 (1890); Opinion of the Judges, 46 Mass. 587 (1843); Fry's Election Case, 71 Pa. 302 (1872).

[7]White v. Tennant, 31 W. Va. 790, 791-93, 8 S.E. 596, 597 (1888); Fry's Election Case, 71 Pa. 302, 309 (1872).

[8]*E.g.*, Clark v. Clark, 71 Ariz. 194, 198, 225 P.2d 486, 488 (1951).

[9]*E.g.*, Ptak v. Jameson, 215 Ark. 292, 220 S.W.2d 592 (1949).

[10]The North Carolina Supreme Court recently adopted this view. Hall v. Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972). Other cases adopting this view are Ptak v. Jameson, 215 Ark. 292, 220 S.W.2d 592 (1949); Parsons v. People, 30 Colo. 388, 70 P. 689 (1902); Vanderpoel v.

his intent to *abandon* his former domicil, he may acquire a new one where he presently intends to reside regardless of the fact that he may intend to leave the place at a definite time in the future.[11]

Courts utilizing the stringent indefinite-time test ignore a student's renunciation of his former domicil unless his intended period of residence in the school community extends beyond graduation.[12] Abandonment of former domicil was shown conclusively in two cases in which seminary students had entered a religious order the rules of which required an oath of renunciation of all family ties and a pledge to regard the seminary as their only home. Nevertheless, because the seminarians were subject to transfer on completion of their studies, the proof of abandonment of former domicil was held irrelevant.[13] The result in such a case is that a student may be disfranchised completely even if he renounced his former residence in good faith.[14] The extreme of disfranchisement was accomplished in New York when a student who lived in a dormitory was denied the vote. He was a naturalized citizen whose parents had come from Germany and spent only a brief time in this country before emigrating to South America. Presumably he could have voted in South America or in Germany, the country of his birth, but he

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O'Hanlon, 53 Iowa 246, 5 N.W. 119 (1880); Sanders v. Getchell, 76 Me. 158 (1884); Goben v. Murrell, 195 Mo. App. 104, 190 S.W. 986 (1916); *In re* Blankford, 241 N.Y. 180, 149 N.E. 415 (1925); *In re* Barry, 164 N.Y. 18, 58 N.E. 12 (1900); *In re* Garvey, 147 N.Y. 117, 41 N.E. 439 (1895); *In re* Goodman, 146 N.Y. 284, 40 N.E. 769 (1895); *In re* Sugar Creek Local School Dist., 185 N.E.2d 809 (Ohio Ct. C.P. 1962); State v. Daniels, 44 N.H. 383 (1862); Fry's Election Case, 71 Pa. 302 (1872); Siebold v. Wahl, 159 N.W. 546 (Wis. 1916). Texas has enacted this view by statute. *See* TEX. ELECTION CODE art. 5.08 (Supp. 1971).

[11]Cases following this view are Welsh v. Shumway, 232 Ill. 54, 83 N.E. 549 (1907); Pedigo v. Grimes, 113 Ind. 148, 13 N.E. 700 (1887); Shaeffer v. Gilbert, 73 Md. 66, 20 A. 434 (1890); Putnam v. Johnson, 10 Mass. 488 (1813); Chomeau v. Roth, 230 Mo. App. 709, 72 S.W.2d 997 (1934); Berry v. Wilcox, 44 Neb. 82, 62 N.W. 249 (1895); Shirelhood v. Davis, 336 F. Supp. 1111 (D. Vt. 1971).

New York abandoned a long line of precedent and implicitly adopted this position in Robbins v. Chamberlain, 297 N.Y. 108, 75 N.E.2d 617 (1947). California has enacted this view by statute. *See* CAL. ELECTIONS § 14283 (West 1961).

[12]Hall v. Bd. of Elections, 280 N.C. 600, 187 S.E.2d 52 (1972); Fry's Election Case, 71 Pa. 302 (1872).

[13]*In re* Blankford, 241 N.Y. 180, 149 N.E. 415 (1925); *In re* Barry, 164 N.Y. 18, 58 N.E. 12 (1900). If this strict test were applied to other segments of society, many non-students would also be disenfranchised. For example, Methodist clergymen are often transferred at regular intervals. Under this strict test they would never be able to acquire a new domicil after abandoning their old one. *See generally*, MISS. CODE ANN. § 3235 (Supp. 1971). The absence of cases protesting such treatment suggests that the law is not uniformly applied, although it purports to be based on general principles of domicil law.

[14]*In re* Blankford, 241 N.Y. 180, 149 N.E. 415 (1925).

was totally without a voting residence in his adopted country![15]

These are not unintended results. The policy behind the rule is to limit a student's ability to vote where he goes to school. The New York Court of Appeals candidly acknowledged this: "It may be urged that the enforcement of this rule will render it well-nigh impossible for a student to establish a residence in a seminary of learning, but the very obvious answer is that the letter and spirit of the New York constitution contemplate such a result."[16] This policy seems to be grounded upon a fear that concentrated student voting would be dangerous. Another court said: "It certainly would strike one as extraordinary to learn that it was in the power of those nontaxpaying sojourners [students] to wrest the city or county government from the voice and hand of the permanent citizens."[17]

Courts that take the more liberal view do not disregard evidence that a student has abandoned his former residence. Of course, they do not accept his declared intent as conclusive.[18] If there is evidence that he is emancipated from his parents,[19] that he provides his own support,[20] that he does not invariably return home on vacations but goes where he can find work,[21] or that he has a family of his own,[22] then these courts may find that his present residence is his domicil. Emancipation and self-support are the most important factors in overcoming the presumption that his residence at school is merely temporary. If he can demonstrate these facts, the court will recognize the location of the school as his domicil despite the fact that he may intend to remain there only for a limited or definite time.

The fact that students plan to stay in one place only for a limited time does not make them substantially different from other young people. A surprisingly modern observation to this effect was made by a court in 1813 in the earliest recorded case in which student voting rights were litigated:

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[15]Watermeyer v. Mitchell, 275 N.Y. 73, 9 N.E.2d 783 (1937). Ironically, the first case in New York to enunciate this strict standard was seeking to preserve the vote of a student at his former residence while he was away at school. *See In re* Goodman, 146 N.Y. 284, 40 N.E. 769 (1895).

[16]*In re* Garvey, 147 N.Y. 117, 123, 41 N.E. 439, 441 (1895).

[17]Goben v. Murrell, 195 Mo. App. 104, ____, 190 S.W. 986, 988 (1916). Similar fears were expressed in Anderson v. Pifer, 315 Ill. 164, 168, 146 N.E. 171, 173 (1925).

[18]Welsh v. Shumway, 232 Ill. 54, 87-88, 83 N.E. 549, 562 (1907).

[19]Putnam v. Johnson, 10 Mass. 488, 500 (1813).

[20]Robbins v. Chamberlain, 297 N.Y. 108, 111, 75 N.E.2d 617, 618 (1947).

[21]Berry v. Wilcox, 44 Neb. 82, 84, 62 N.W. 249, 250 (1895).

[22]Robbins v. Chamberlain, 297 N.Y. 108, 111, 75 N.E.2d 617, 618 (1947).

> In this new and enterprising country, it is doubtful whether one half of the young men, at the time of their emancipation, fix themselves in any town with an intention of *always staying there*. They settle in a place by way of experiment, to see whether it will suit their views of business and advancement in life; and with an intention of removing to some more advantageous position if they should be disappointed. Nevertheless, they have their home in their chosen abode while they remain. Probably the meaning of [the rule] is, that the habitation fixed in any place, without any present intention of removing therefrom, is the domicile. At least, this definition is better suited to the circumstances of this country.[23]

The Missouri Supreme Court best articulated the policy that should dictate a court's interpretation of voter residency requirements when it said that election laws should be liberally construed in aid of the right to vote. It dismissed the fear that a combination of students might control an election as an unworthy ground for denying them suffrage. Even the fact that students might not be taxpayers was held to be an invalid consideration since that is not a prerequisite for voting. The court found that students have an interest in electing officials because they are subject to local laws.[24]

II. THE EQUAL PROTECTION CLAUSE APPLIED TO RESIDENCE REQUIREMENTS[25]

Although the Constitution recognizes the right of the states to determine voting qualifications,[26] the Supreme Court has held that state legislative classifications must not violate the equal protection clause of the fourteenth amendment.[27] Dicta in recent Supreme Court cases concede that states may limit the franchise to bona fide residents within this constitutional limitation.[28] The two differing views of the way in which a student may establish a new residence both assume that a finding of local domicil is necessary before a student has the right to vote in local elections and require a student to overcome a presumption that his residence at school is temporary. The presumption, whether created

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[23]Putnam v. Johnson, 10 Mass. 488, 501 (1813).

[24]Chomeau v. Roth, 230 Mo. App. 709, ____, 72 S.W.2d 997, 1000-01 (1934).

[25]This note will not examine the effect of durational residence requirements on a student's right to vote. Students can generally meet durational residence requirements; they have a more difficult time showing that they are bona fide residents of the town where they attend school.

[26]*See* Pope v. Williams, 193 U.S. 621, 632-33 (1904).

[27]*E.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

[28]See cases cited *infra* note 53.

judicially or by statute, is merely an aspect of the law of domicil. In theory all persons, not merely students, must prove domiciliary intent before they are allowed to vote in local elections.[29] All persons whose occupations require them to move regularly or who have entered into short-term contracts to work in particular places must be able to resolve judicial doubt as to their intent to establish a domicil. In order to do this they must prove facts that will indicate this intent, such as purchase of a home or auto registration. The necessity of proving intent elevates the requisite evidence into additional qualifications for the right to vote. However, it would be constitutionally impermissible to impose voting qualifications consisting of the facts usually established by such evidence.[30] Even if this evidence is not viewed as an explicit qualification for the right to vote, the application of the presumption against domicil by reason of a person's "temporary" occupation presents a constitutional issue as to whether this discriminatory classification denies a person's right to equal protection when it denies him the privilege of freely declaring his domiciliary intent once he has proved that he lives in the community.[31] At the present time, only two states statutorily grant this privilege to students.[32]

State legislative classifications are judged by one of two standards under the equal protection clause. The Supreme Court normally gives the states the benefit of the doubt and presumes that the classification is constitutional. The Court will uphold a classification so long as the legislative distinctions "bear some relationship to a legitimate state end . . . [and are not] based on reasons totally unrelated to the pursuit of

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[29]Even when a statute does not violate the equal protection clause, the discriminatory application of the statute may be unconstitutional. Yick Wo v. Hopkins, 118 U.S. 356, 373-74 (1886).

[30]Any qualifications based on wealth, such as requiring independent means of support to prove a student's emancipation or requiring ownership of property to prove intent to remain in the community, would be constitutionally impermissible. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 683 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

[31]Where students had to answer questionnaires as to their domiciliary intent, but no other class of persons had to do so, the practice was held to violate the equal protection clause. Bright v. Baesler, 336 F. Supp. 527 (E.D. Ky. 1971).

[32]In Colorado a student may overcome the presumption that his residence at school is temporary by filing a written affidavit under oath with the county clerk that he has abandoned his former domicil and established a new one. COLO. REV. STAT. ANN. § 49-3-4(2) (1964). In Wisconsin a student who resides part of the year with his parents may establish a new residence by electing to register elsewhere. WIS. STAT. ANN. § 6.10(4) (1967). In 1971 Vermont deleted a provision similar to that of Colorado. VT. STAT. ANN. tit. 17, § 66 (Supp. 1971).

that goal."[33] However, when a fundamental constitutional right is affected by the state legislative classification, the state must show that the classification is necessary to promote "a compelling governmental interest."[34] The constitutionality of the presumption that a student's presence at school is for temporary purposes turns upon which of these two standards is applied.

The courts early recognized student residency requirements as having two primary purposes.[35] First, they serve to prevent fraud by identifying the voter as a member of the community and by protecting against the possibility of voting in two places.[36] Secondly, they endeavor to ensure that the voter is interested in matters pertaining to the community's government.[37]

Fraud can be discovered only by diligent investigation and administrative procedures that can detect simultaneous registration at two or more places. The assumption is that a factual determination of domicil would be the same no matter where the attempt to register was made. Practically speaking, a person who maintains more than one residence could easily convince officials in each place that he is domiciled there, especially if he made false statements. Fraud becomes less possible when one is an identifiable member of the community—but physical presence, not domiciliary intent, distinguishes this factor. Once suspicion of duplicity arises, fraud becomes no more difficult to detect if the registrant is allowed the freedom to declare his voting residence. These facts suggest that an independent factual determination of domicil is at best unnecessary for the prevention or detection of fraud.[38]

The other purpose of residence requirements is to ensure that the franchise is limited to citizens who have an interest in the community. Assuming that one who regards his residence as his home has a deeper

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[33]McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

[34]Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[35]One purpose underlying stringent residence requirements is to disenfranchise students and other "transient" citizens out of a fear that they might be able to control the elections. This purpose was deemed constitutionally impermissible in Carrington v. Rash, 380 U.S. 89. 93-94 (1965).

[36]Fry's Election Case, 71 Pa. 302, 306-08 (1872); Putnam v. Johnson, 10 Mass. 488, 502 (1813).

[37]Shaeffer v. Gilbert, 73 Md. 66, 70-71, 20 A. 434, 435 (1890); *see also* Fry's Election Case, 71 Pa. 302, 311 (1872).

[38]A factual determination of domiciliary intent by election officials is open to misuse by unscrupulous officials. Registrars may require proof of domiciliary intent only from certain segments of society, omitting the requirement for others. *See* note 14 *supra*. If one is allowed to declare his intent to reside in a particular place, this particular form of discrimination would be obviated.

interest in the community than one who regards his residence there as temporary, the question becomes whether a voluntary declaration of domiciliary intent will not serve this purpose as well as a factual determination of intent. A voluntary declaration would seem to *create* an interest in the community even if one did not exist before. A domiciliary usually becomes subject to many of the obligations of citizenship—such as local taxation, jury duty, and auto registration—which do not fall on temporary residents. This fact alone would seem to ensure good faith as much as possible. In addition, the interest of a voter is affected by physical residence in the community as well as by domiciliary intent.

According to the Supreme Court, the "interest" that warrants a vote is not a narrow concept. Persons who pay property taxes obviously have an interest in how their money is spent. Persons who live in a community but who do not pay a property tax are also interested in local government: they are subject to the criminal laws, send their children to public school, use municipal services, and are subject to gasoline, sales, and use taxes.[39] They have an interest in being represented in the state legislature because they are included in the census of the local community on which apportionment of the legislature is based.[40] A student who physically resides in the community for a large part of the year must inevitably qualify as an "interested" citizen. Only the possession of a domicil elsewhere should exclude him from voting in local elections.

Although one may properly conclude that a factual determination of domicil as required by the rebuttable presumption of a student's domiciliary intent is unnecessary or even superfluous, this does not force a conclusion that the practice is unconstitutional. A factual determination of domicil is not "totally unrelated"[41] to the legitimate state goals of preventing fraud or limiting the franchise to interested voters, and thus the practice of requiring it is not unconstitutional under the traditional equal protection test. However, if the compelling interest standard is applied, then no state will be able to show an interest sufficient to support the presumption. An independent factual determination of domiciliary intent does not serve the purposes of preventing fraud and ensuring the interest of voters in any way that would not be better served

[39]Evans v. Cornman, 398 U.S. 419, 424 (1970).

[40]*Id.* at 421. Students are included in the census where they go to school and not where their parents reside. Bethel Park v. Stans, 449 F.2d 575, 579-81 (3d Cir. 1971).

[41]McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969).

by a voluntary declaration of domiciliary intent by the voter.[42] Yet the former method of establishing intent will inevitably exclude many "interested" persons who subjectively intend to establish a voting residence in the community. The latter method would exclude none of them. Thus the high standards of exactness required by the compelling interest standard are not met.[43]

III. WHICH STANDARD APPLIES?

Thus the crucial issue regarding the constitutionality of the presumption against domicil is whether the traditional or compelling-interest equal protection test is applied. The Michigan court in *Wilkins v. Bentley*[44] applied the compelling-interest test on the theory that precedents had resolved the issue. That proposition is not entirely true, for no prior Supreme Court cases apply directly to the issue in *Wilkins*.

The Michigan court determined that the statutory presumption of non-residency placed a special "burden on the right to vote" of students and quoted language from the Supreme Court decision in *Williams v. Rhodes*[45] to the effect that whenever the right to vote is "heavily burdened," the state must show a "compelling interest" to justify the burden.[46] However, that language was taken from its proper context and does not support the proposition for which it was cited in *Wilkins*. In *Williams*, the issue was whether a state could restrict access by third party candidates to the ballot for presidential electors. The Court held that the Ohio restrictions diluted the effectiveness of the votes of qualified voters who desired to vote for third party candidates. Thus the "burden" in *Williams* fell on qualified voters whose right to vote was recognized by the state.[47] Other Supreme Court decisions have pointed out that there is no fundamental "right to vote" as such.[48] One's right to vote depends on whether he meets the legitimate qualifications required by the state. If there were an unquestioned fundamental right to vote, then the "compelling state interest" standard undoubtedly would

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[42]This point is discussed in text accompanying notes 36-41 *supra*.

[43]Kramer v. Union Free School Dist., 395 U.S. 621, 632 (1969).

[44]385 Mich. 670, 189 N.W.2d 423 (1971).

[45]The language appears in 393 U.S. 23, 30-31 (1968).

[46]385 Mich. at 670, 189 N.W.2d at 429.

[47]393 U.S. at 30-34.

[48]Pope v. Williams, 193 U.S. 621, 632-33 (1904), *cited in* Carrington v. Rash, 380 U.S. 89, 91 (1965); *see also*, Oregon v. Mitchell, 400 U.S. 112 (1970).

apply to any state restrictions of that right.[49]

Similarly, the Michigan court gave improper weight to other Supreme Court precedents which had established the principle that any *exclusion of bona fide residents* who meet the other qualifications for voting must be justified by a compelling state interest.[50] The Michigan court stretched the facts and language of those cases to hold that the "exclusions" dealt with were something less than complete denials of the vote and were mere "rebuttable presumptions" similar to the Michigan statute.[51] By this imaginative interpretation, the *Wilkins* court was able to apply the "compelling interest" test to the Michigan statute without confronting the fact that the Michigan statute was not designed to exclude persons who were bona fide residents under traditional domicil law. In the Supreme Court cases cited by the Michigan court, the excluded citizens were all stipulated to be bona fide residents by the states concerned;[52] the states argued against their "interest" in the elections and not against their residence.[53] The Supreme Court has never defined the residency standards permissible under the equal protection clause. Thus, the Michigan court was breaking new ground and not well-plowed earth as the opinion would lead one to believe.

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[49]Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[50]These cases all involved state exclusion of *domiciliaries* from the franchise. City of Phoenix v. Kolodziejski, 399 U.S. 204, 206 (1970); Evans v. Cornman, 398 U.S. 419, 421 (1970); Cipriano v. City of Houma, 395 U.S. 701, 703 (1969); Kramer v. Union Free School District, 395 U.S. 621, 624-25 (1969); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 664 (1966); Carrington v. Rash, 380 U.S. 89, 91 (1965).

[51]The Michigan court said that what the Supreme Court termed an "exclusion" of qualified voters was not a total denial of the right to vote. 385 Mich. at 682-83, 189 N.W.2d at 428-29. Texas had enacted a conclusive presumption that servicemen resided where they had resided when they entered the service. Carrington v. Rash, 380 U.S. 89, 91 (1965). The *Wilkins* court felt that this did not prevent a serviceman from voting in another state and called it less than a complete denial of the vote. However, Texas clearly had done all it could to deny servicemen the vote. The Michigan court also said that when New York would not permit bachelors or persons who did not own property to vote in school elections, Kramer v. Union Free School Dist., 395 U.S. 701, 703 (1969), or when Louisiana, Cipriano v. City of Houma, 395 U.S. 701, 703 (1969), and Arizona, City of Phoenix v. Kolodziejski, 399 U.S. 204, 206 (1970), did not permit persons who did not pay property taxes to vote for bond issues, the states were merely enacting "rebuttable presumptions" similar to the Michigan statute. That reasoning is patently absurd. Though one individual might remove himself from the excluded class, the class of excluded citizens would remain unchanged.

[52]Carrington v. Rash, 380 U.S. 89, 91, 93-94 (1965); *cited in* Evans v. Cornman, 398 U.S. 419, 421 (1970); Kramer v. Union Free School Dist., 395 U.S. 621, 625 (1969).

[53]In some Supreme Court cases in which voting rights under the equal protection clause were considered, the concerned parties were qualified voters. *E.g.*, Gray v. Sanders, 372 U.S. 368, 379 (1964); McDonald v. Board of Election Comm'rs, 394 U.S. 802, 803 (1968). In all others they were stipulated to be domiciliaries of the state. *See* cases cited *supra* note 51.

Although Supreme Court precedents do not lead directly to a conclusion that the compelling interest standard applies to rebuttable presumptions against residency, one may glean from the opinions sound principles that will support such a result. In *Kramer v. Union Free School District*,[54] the Supreme Court said that the presumption of constitutionality and the "traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinctions made"[55] did not apply when there was evidence that the statute involved denied the vote to qualified residents. The presumption of constitutionality is based on the "assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."[56]

One might argue that Kramer's express limitation of this principle to residents was merely incidental to the basic idea that whenever the assumption of the *representative* character of state government is called into question, the traditional presumption of constitutionality will not apply. The Court should carry *Kramer* one step further and apply the compelling interest test whenever there is evidence that any *person* is excluded from the franchise. Arguably, the Court should do so; demonstrably, it has not.[57]

The Court should give special consideration to the fact that a person who challenges the representative character of state government has exhausted every formal method of redressing his grievances when he loses in court.[58] Implicit in the traditional presumption of constitutionality is the idea that if a person who has challenged a state legislative scheme loses in court, he may still seek to change the law directly by exercise of his voting power. This alternative is not available to one who alleges that he is unlawfully disenfranchised. If he is able to vote only in another state or in federal elections, he cannot affect the legislative scheme of the state that excluded him. Moreover, Congress apparently

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[54]395 U.S. 621 (1969).

[55]*Id.* at 627-28.

[56]*Id.*

[57]*See* note 54 *supra*. The "compelling interest" standard was rejected in Palla v. Board of Elections, 40 U.S.L.W. 2835 (N.Y. Ct. App. June 7, 1972).

[58]*Cf.* Baker v. Carr, 369 U.S. 186, 258-59 (Clark, J., concurring). Of course, one who is denied a vote may always seek to change the law through moral suasion of the legislature. However, this is hardly a guarantee that one's proposals will be treated fairly.

lacks the power under the enforcement clause of the fourteenth amendment to change the state legislative scheme.[59]

States have argued that a voter who cannot acquire a voting residence in one state is not thereby prevented from voting in the state where he retains his domicil.[60] This fact should not cloud the issue. One state cannot lawfully prevent a person from voting in another state; each state separately determines the right to vote of those persons who seek to vote in its own elections. If a state attempted to exclude people from voting in the elections of another state, it would be violating a fundamental principle of state sovereignty.[61] However, state policies that make it difficult for students to acquire a new domicil require that a student retain his old one if he wishes to vote at all. This may deny the student the *effective* exercise of his voting right. The availability of an absentee ballot does not refute this assertion. If one has removed from a locality, he likely has little interest and information on which to base a vote on matters of local concern. Thus one state may have a definite impact on the composition of the voting populace in another state by foisting on that state a class of voters who must either vote there or not at all. The issue is one of national import and, therefore, is not an appropriate subject for judicial deference to states' rights.

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[59]Congress was said to have broad powers to determine when legislation is appropriate under the enforcement clause of the fourteenth amendment in Katzenbach v. Morgan, 384 U.S. 641 (1966). There the Court upheld a Congressional prohibition of state laws that denied the right to vote because of an inability to read English. The purpose of the legislation was to ensure that Puerto Rican immigrants, among others, would be allowed to vote if they had attained the requisite level of education. *Id.* at 643 n.1. However, *Morgan* was not followed in a more recent case in which the Supreme Court held that Congress did not have the power to lower age qualifications in state elections to age eighteen. Oregon v. Mitchell, 400 U.S. 112 (1971). It is not clear why *Morgan* did not control that case. Various reasons were given to distinguish *Morgan* in the separate opinions of the justices who formed the majority on that issue. *Morgan* was said to uphold the power of Congress to ban "racial discrimination," *id.* at 129 (Black, J.), or discrimination against a "discrete and insular minority," *id.* at 296 (Stewart & Blackmun, JJ., & Burger, Ch. J.). Four justices denied that Congress could be the judge of the appropriateness of legislation enacted pursuant to the enforcement clause, *id.* at 204-05 (Harlan, J.), or could make a determination of substantive constitutional law that the compelling-interest standard applied to particular state legislation, *id.* at 295-96 (Stewart & Blackmun, JJ., & Burger, Ch. J.). On any of the above grounds Congressional legislation would be inappropriate to change state voting-residency laws. Thus *Oregon v. Mitchell* must be read as having limited the application of the broad Congressional power recognized in *Morgan.*

[60]Carrington v. Rash, 380 U.S. 89, 89 n.1 (1965); Wilkins v. Bentley, 385 Mich. 670, ____, 189 N.W.2d 423, 428-29 (1971).

[61]*See* Pink v. A.A.A. Highway Express, 314 U.S. 201, 209-11 (1941).

IV. CONCLUSION

Rebuttable presumptions as to a student's domiciliary intent do not appear to be discriminatory in theory, because all persons are subject to a factual determination of domiciliary intent under a strict application of the law of domicil to voting residency laws. However, the burden of factual proof is greater for those whose presence in the community is for what are ordinarily conceived to be "temporary" purposes. Thus students, unlike persons in other occupational categories, are not able to vote in local elections after establishing that they dwell in the community and declaring their domiciliary intent. This discrimination is not strictly necessary to achieve any legitimate state purpose and cannot be sustained under the equal protection clause if the "compelling interest" standard is applicable. That standard should be invoked by the courts whenever any person is denied the vote, whether or not he be an admitted resident by state standards. A citizen's vote is the foundation of our representative democracy. Any state abridgement of access to the vote should be given the closest judicial scrutiny. The equal protection clause requires no less!

VANCE BARRON, JR.

Here's to You Mrs. Robinson—Title VII and the Hangover Effect of Prior Racial Discrimination in Hiring

Mrs. Dorothy Robinson applied for a job with the P. Lorillard Company at its Greensboro, North Carolina, plant following its opening there in 1956.[1] Mrs. Robinson was referred to the North Carolina Employment Service Office, an exclusively Black agency. All of Lorillard's Black job applicants were referred to that office. During this time, Lorillard practiced a policy of racial discrimination in its hiring policy. Mrs. Robinson was allowed to apply only for a position in one of the "Black" departments of the Company. She accepted a job in the "Black" service department and had worked for Lorillard from that time.[2]

Mrs. Robinson and her fellow employees, both Black and White,

[1]During the course of the litigation discussed below, P. Lorillard Company changed its name to Lorillard Corporation.

[2]Robinson v. Lorillard Corp., 319 F. Supp. 835, 836-37 (M.D.N.C. 1970).